

Original

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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DA 00-322

Amendment of Section 73.202(b),  
Table of Allotments, FM Broadcast Stations  
(Anniston and Ashland, AL, College Park,  
Covington, and Milledgeville, Georgia

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)  
MM Docket No. 98-112  
RM-9027  
RM-9268  
RM-9384

To: Mass Media Bureau

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

PRESTON W. SMALL  
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August 23, 2000

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Preston W. Small (Small), by his attorney, hereby replies to Radio South, Inc.'s (RSI) August 16, 2000 *Comments on Petition for Reconsideration (Comments)* and WNNX License Investment Co.'s August 15, 2000 *Opposition to Petition for Reconsideration (Opposition)*. In reply thereto, the following is respectfully submitted:

1) While styled as mere comments, RSI's *Comments* must be read as an opposition pleading because RSI requests "that the Mass Media Bureau deny at the earliest possible time the Petition for Reconsideration." *Comments*, at 2. Even if RSI's comments were not filed a day late as RSI acknowledges, RSI's *Comments* are not properly before the Commission.

2) RSI seeks denial of the petition for reconsideration because RSI's application bearing File No. BPH-19991012AAG is contingent upon finality of the rulemaking underlying Mr. Small's *Petition for Reconsideration* and, implicit in RSI's proffer, RSI's application is contingent upon Mr. Small's position ultimately being denied.<sup>1</sup> *Comments*, at 2 ("as a result of the filing of the Petition for Reconsideration, the Report and Order has not become final and the staff of the Mass Media Bureau will not process RSI's application until the reconsideration petition is acted upon."). Except in limited circumstances which RSI does not rely upon, contingent applications are not permitted in the broadcast services and RSI's application must be dismissed. 47 C.F.R. § 73.3517. *See also Report and Order*, 14 FCC Rcd. 21165 n. 1 (Alloc. Br. 1999) ("our policy is not to accept proposals that are dependent or contingent upon finality of other actions or proceedings.").

3) Moreover, the Commission has determined that "applicants using the one-step process to file an application in conflict with an earlier filed petition [for rulemaking] should file the application prior to the deadline for filing counterproposals to the petition" else the application

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<sup>1</sup> If RSI were not interested the result, it would not have limited its request to a denial of Mr. Small's *Petition for Reconsideration*.

“would constitute late-filed comments in the rule making proceeding . . .” *Report and Order*, 8 FCC Rcd. 4735 ¶ 18 & n. 31 (Comm’n 1993). RSI’s October 12, 1999 application was filed well after the pertinent comment period in the subject rulemaking proceeding. Thus, even if RSI’s application were properly on file, the record in the rulemaking has closed and it is too late to consider RSI’s proposed upgrade in the public interest calculus vis-a-vis the rulemaking underlying the instant proceeding. Accordingly, no weight can be given to RSI’s preference for which side should prevail on the *Petition for Reconsideration*.

4) While the text of WNNX’s *Opposition* is 60% longer than the text of Mr. Small’s *Petition for Reconsideration*, and while WNNX quibbles with facts and the quality of facts, such as who has better census information, the US Census or the city of College Park, WNNX completely fails to discuss the rationality of the *Tuck* factor analysis as applied in this case.

5) Mr. Small argued that various of the *Tuck* factors, while relevant to determining whether a community exists for allocation purposes, i.e., zip codes, elected officials, telephone books, local newspapers, public perception, they are irrational in connection with determining the economic dependence of one community upon another, especially where the analysis does not account for the fact that the neighboring urban center owns more than half of the land area of the purportedly “independent” proposed community of license.<sup>2</sup> WNNX fails to address the rationality of using

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<sup>2</sup> WNNX now claims that “to the east [College Park] is bordered by the Hartsfield-Atlanta International Airport.” WNNX *Opposition*, at 16 n. 16. The record reflects that the airport is in College Park, it does not border College Park. The record also shows that WNNX relied upon the existence of the airport within College Park as a factor purportedly showing College Park’s independence. See WNNX’s November 6, 1997 *Petition for Rulemaking*, at 12 (“Two of the most visible signs of College Park’s economic independence are the Hartsfield Airport and the City-owned and operated Convention Center . . .”); see also WNNX’s November 6, 1997 *Petition for Rulemaking*, at 14 (“College Park is home to the Hartsfield Airport . . . The Airport is subject to the City’s taxing authority and is therefore a major source of revenue to College Park.”); see further WNNX’s November 6, 1997 *Petition for Rulemaking*, at 15 (“College Park has unique attributes,  
(continued...)”)

these factors to determine a community's independence from another. WNNX also fails to discuss the fact that because the proposed community is closely situated to the urban center, the *Tuck* analysis is not a "best of eight" competition.

6) WNNX fails to discuss whether the failure of the rulemaking order to discuss various critical issues renders the order "unreasoned." For instance, WNNX fails to argue that the *Report and Order's* failure to discuss WNNX's initial reliance upon the Hartsfield-Atlanta Airport to support its independence showing, which reliance was later abandoned when WNNX learned that the airport is owned and operated by the urban center city, i.e., Atlanta, nevertheless results in a reasoned decision. Nor does WNNX comment upon the fact that the rulemaking order fails to address the issue that WNNX's proposal is a retry of an earlier failed attempt to move the Anniston station to Atlanta and that WNNX's proposal is, on its face, merely a technical manipulation of the Commission's rules in order to move a station into an urban market.

7) We will not insult the Commission's intelligence by claiming that by failing to raise counter arguments that WNNX concedes these various points. However, it can be maintained with assurance that WNNX's silence is indicative of WNNX's recognition that Mr. Small made excellent points, that had WNNX had anything constructive to add, that WNNX would have provided that information, and that on many critical issues WNNX was left speechless.

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<sup>2</sup>(...continued)

most notably the Convention Center and Hartsfield International Airport, which make it a thriving, self-sustaining community that is beyond a doubt independent of Atlanta."'). While WNNX might try to downplay what WNNX had termed "the most visible sign[] of College Park's economic independence" after learning from Mr. Small's counterproposal that the Airport, and more than half the land area of College Park, is owned by the City of Atlanta, the fact is, WNNX relied heavily upon the Airport and WNNX linked the Airport to College Park's fortunes. Not only is WNNX's backtracking on this issue undeserving of any credit, WNNX's recent statement indicating that the airport only "borders" College Park amounts to misrepresentation in light of WNNX's earlier admissions that the airport is within the boundaries of College Park. The Commission cannot simply ignore the contradictory information which WNNX provided in its *Petition for Rulemaking*.

8) WNNX would have been better served by remaining speechless on the Airport issue. As explained in footnote 2 above, WNNX's *Opposition* misrepresents facts regarding the Hartsfield-Atlanta Airport in a continuing effort to downplay the importance of the Airport to this case and in order to cover up WNNX's obvious tactical error where its November 6, 1997 *Petition for Rulemaking* presented the Airport as a huge factor purportedly showing College Park's economic independence.<sup>3</sup> WNNX's statement in its *Opposition* which tries to place the Airport outside of College Park is not the product of carelessness, but it is a calculated attempt to deflect attention away from WNNX's earlier, now obviously blatant, tactical error in which WNNX's *Petition for Rulemaking* relied upon an airport owned by the City of Atlanta to try to show the economic independence of College Park from the City of Atlanta. While the Commission should have called WNNX onto the carpet for WNNX's earlier effort to distance itself from its initial reliance upon the Airport, the Commission simply cannot tolerate misrepresentation of facts in its proceedings and disqualification of WNNX is now appropriate. *Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1196 (1986); *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983). It is manifest that Mr. Small should not have to compete against a party which is misrepresenting facts.

Respectfully submitted,  
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His Attorney

August 23, 2000

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<sup>3</sup> WNNX has motive and an intent to deceive the Commission.

## CERTIFICATE OF SERVICE

I hereby certify that I have this 23<sup>rd</sup> day of August 2000 served a copy of the foregoing REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION by First-Class United States mail, postage prepaid, upon the following:

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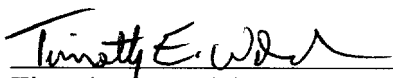
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